No. 83-1762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY & BRYANT CO., *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

DAVID C. MURCHISON, P.C.
(Counsel of Record)
ROBERT J. BROOKHISER, JR.
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800

Attorneys for Petitioners
Harry & Bryant Co.
Bass-Smith Funeral Home, Inc.
Thomas Shepherd & Son, Inc.
Warlick Funeral Home, Inc.
Jernigan-Warren Funeral Home, Inc.
Frank Vogler & Sons, Inc.
Andrews Mortuary, Inc.

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PETITIONERS' REPLY BRIEF

In opposing the petition, the FTC misstates or misconceives the question presented. The issue is not, as the FTC erroneously suggests, whether in reviewing the decision of an administrative agency, a Court of Appeals must have the entire administrative record in its physical possession or whether it must read every single page in that record. Instead, the issue is whether a Court of Appeals can properly conclude that an agency rule is supported by substantial evidence in the record when it did not review—and could not have reviewed—the disputed evidence cited by the parties because the administrative record was never transmitted to the court despite

petitioners' requests that this be done in accordance with Rule 17(b) of the Federal Rules of Appellate Procedure.

The FTC acknowledges, as it must, that judicial review of administrative rulemaking under a "substantial evidence" standard requires a court to consider both the evidence supporting an agency's factual findings and also any contradictory evidence that "fairly detracts from its weight." FTC Br. at 8, citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-488 (1951). Likewise, the FTC recognizes that in conducting such a review, the court must examine the record evidence relied upon by the parties. FTC Br. at 9, citing 4 K. Davis, *Administrative Law Treatise* § 29.03 at 130 (1st ed. 1958). *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) ("searching and careful" review of record).

Contrary to the FTC's assertion, however, this was not the process that was followed below. The Court of Appeals did *not* review the evidence cited by the parties because that evidence remained at the FTC offices in Washington despite requests by petitioners that it be transmitted to the Court of Appeals in Richmond. Under the circumstances, the Court of Appeals could not have conducted the type of review required by statute, and the court's action represents such a drastic departure from accepted judicial practice that summary reversal is appropriate.[1] The integrity of the judicial process demands no lesser remedy when, as here, the Court of Appeals has erroneously stated that "after a careful re-

[1] In this case, the pertinent statute was the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, 15 U.S.C. § 57a (1982). However, this is only one of many statutes which provide for judicial review of agency determinations on a substantial evidence standard. *See* Pet. at 11 n.10; Pet. App. 62a-69a. The FTC does not seriously dispute that the issue presented is of central importance to the effectiveness of the congressional scheme for judicial oversight of the federal administrative process that is reflected in these statutes. *See* Pet. 11-13.

view of the whole record we conclude that petitioners' challenges to the Funeral Rule are without merit." (Pet. App. 18a.)

Petitioners contended below that the FTC's Funeral Rule was not supported by substantial evidence in the rulemaking record. Within the limitations of an appellate brief, petitioners analyzed in detail the inadequacy of the record evidence relied upon by the FTC, as well as the importance of the contrary evidence ignored or downplayed by the FTC.[2] For example, petitioners demonstrated the fundamental methodological deficiencies which completely undermined the validity of the hodgepodge of "survey" evidence on which the FTC relied to support virtually every aspect of the Rule.[3] Petitioners also showed by examples that the non-survey evidence relied upon by the FTC was sporadic and anecdotal and did not justify an industry-wide rule predicated upon the existence of unfair or deceptive practices throughout the entire funeral industry.[4] Significantly, petitioners then showed that the record evidence did not support the fundamental factual assumptions on which the Rule was based, *e.g.*, that consumers are unable to make informed choices, that price information is unavailable to consumers, and that the failure to itemize prices in the detailed manner required by the Rule leads to higher prices or the purchase of unwanted items.[5]

Due to the bulk of the record and the fact that the FTC's lengthy Statement of Basis and Purpose supporting the Rule, 47 Fed. Reg. 42,260-42,304 (1982) (copies previously lodged with the Clerk of this Court), contains

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[2] For the convenience of the Court, petitioners have lodged 10 copies of their briefs in the Court of Appeals with the Clerk of this Court.

[3] C.A. Br. 25-33; C.A. Reply Br. 12-14.

[4] C.A. Br. 33-35; C.A. Reply Br. 14-15.

[5] C.A. Br. 37-42, 42-44, 48-53; C.A. Reply Br. 15-16, 17-19.

literally thousands of unanalyzed citations to the record, petitioners were not able to designate more than a fraction of such evidence for inclusion in the joint appendix. To do so would have required that all, or most, of the administrative record be included.[6] Rather, pursuant to Rule 17(b) of the Rules of Appellate Procedure, petitioners sought to exercise their right to have the record transmitted to the Court of Appeals for its review. As the FTC admits, the Court of Appeals refused to do so. Accordingly, the Court did not and could not analyze the disputed evidence in the record.

In opposing the petition, the FTC completely ignores the pertinent language of Rule 17(b) of the Federal Rules of Appellate Procedure which, as the FTC recognized before the Court of Appeals, gives petitioners the *right* to have the record transmitted to the Court of Appeals. *See* Pet. App. 55a. The Rule explicitly states that upon the request of a party, "the record or any part thereof . . . *shall be transmitted* to the court. . . ." (emphasis added). *See also* 28 U.S.C. § 2112(b) (1982) ("The agency . . . if so requested by the petitioner for review . . . *shall*, file in the court the entire record of the proceedings before it *without abbreviation*.") (emphasis added). The Court of Appeals ignored these provisions and effectively blocked petitioners' efforts to have the record transmitted.

In a feeble attempt to justify this inexcusable departure from established practice, the FTC here relies on those portions of 28 U.S.C. § 2112(a) (1982) and Rule

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[6] Thus, the joint appendix consisted principally of non-evidentiary material such as the 165-page report of the presiding officer (C.A. App. 935-1100), or the 580-page staff report (C.A. App. 1101-1679), or various pleadings, rulings and transcript references which related to procedural issues raised on appeal. Accordingly, the FTC's suggestion that the Court of Appeals adequately reviewed the evidence in a 70,000-page record because it had possession of the 1,900-page joint appendix and a certified index of the record is disingenuous at best.

17(b) which deal with the composition of the administrative record on appeal and provide only that material retained by the agency remains a part of the record for purposes of review. The purpose of these provisions is not, as the FTC implies, to permit the Court of Appeals to refuse to review the administrative record or to refuse the request of a party to have that record transmitted to the court. Rather, these provisions simply seek to insure that the entire administrative record remains a part of the record for purposes of review so that it is available for transmission to the Court of Appeals when requested by a party.[7]

The FTC's attempt to convert petitioners' claim into an argument that every page of the administrative record must be reviewed whether or not it is relevant to the issues on appeal is a transparent effort to divert the Court's attention from the Court of Appeals' complete failure to examine relevant portions of the record. Had the Court of Appeals examined the evidence in question, it would not have upheld the Funeral Rule, as promulgated, as supported by substantial evidence in the record.[8]

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[7] As Professor Moore states, Rule 17 provides

> that when less than the entire record is transmitted to the court of appeals, either through stipulation or through the election of the agency to file a list in lieu of the record, the parts that are not transmitted to the court of appeals remain part of the record on review *and must be transmitted at the request of any party* or the court, despite any stipulation.

9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice*, ¶ 217.02[3] at 17-5 (2d ed. 1982) (emphasis added).

[8] Contrary to the FTC's claim (FTC Br. at 7), petitioners emphatically contend that the Court of Appeals failed to consider the evidence in dispute. The FTC's related suggestion that the petition should be denied because petitioners allegedly failed to direct the Court's attention to the evidence which they contend the Court should have examined is also without merit. Petitioners' briefs dealt with such evidence in detail, providing record citations to

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

DAVID C. MURCHISON, P.C.
(Counsel of Record)
ROBERT J. BROOKHISER, JR.
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800

Attorneys for Petitioners
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a variety of surveys, testimony and other material relied on by the FTC. Had the record been transmitted to the Court of Appeals, it would have been a simple matter for the Court to review the specific items identified. This is not a case where a petitioner simply raises a general question as to the substantiality of the record evidence and leaves the Court to undertake its own search through the record.